

APPEAL NO. 041512
FILED AUGUST 12, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 27, 2004. The hearing officer determined that the appellant's (claimant herein) compensable injury did not extend to include an L1-2 bulging disc, L5-S1 radiculopathy, and left tarsal tunnel syndrome, and that the respondent (carrier herein) did not waive its right to dispute the compensability of the L1-2 bulging disc, the L5-S1 radiculopathy, and the left tarsal tunnel syndrome under Section 409.021. The hearing officer also determined that the claimant's impairment rating (IR) is 21% based upon the report of a designated doctor. The claimant appeals the hearing officer's extent-of-injury determinations. The claimant first points out that the hearing officer's determination that the claimant's injury did not extend to include tarsal tunnel syndrome is error as a matter of law as the parties stipulated that the compensable injury included tarsal tunnel syndrome. The claimant contends that the hearing officer's determinations that the claimant's injury did not extend to include L1-2 bulging disc and L5-S1 radiculopathy are contrary to the evidence. The claimant also contends that the whole body impairment assessed by the designated doctor for the lumbar spine should have been included, giving the claimant a 29% IR. Finally, the claimant argues that the hearing officer erred regarding carrier waiver. The carrier responds that the parties did stipulate that the claimant's injury includes tarsal tunnel syndrome and the hearing officer's decision should be corrected in this regard. The carrier argues that the evidence supports the hearing officer's extent-of-injury determinations concerning the L1-2 bulging disc and L5-S1 radiculopathy and the hearing officer's resolution of the carrier waiver issue. The carrier states that these determinations, as well as the finding of a 21% IR, should be affirmed.

DECISION

Affirmed in part; reversed and rendered in part.

CARRIER WAIVER

The hearing officer determined that the carrier did not waive its right to contest the compensability of the claimant's L1-2 bulging disc, L5-S1 radiculopathy and left tarsal tunnel syndrome. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)) provides that Section 409.021, regarding the initiation of benefits and carrier waiver, does not apply to "extent of injury" disputes. We have said that that rule cannot be interpreted in a way that would allow a dilatory carrier to recast the primary claimed injury issue as an "extent issue" and thereby avoid the mandates of Section 409.021. See Texas Workers' Compensation Commission Appeal No. 022454, decided November 18, 2002; Texas Workers' Compensation Commission Appeal No. 021907, decided September 16, 2002; Texas Workers' Compensation Commission Appeal No. 021569, decided August 12, 2002; and Texas Workers' Compensation Commission

Appeal No. 022183, decided October 9, 2002. However, under the facts of this case and in light of the factual findings of the hearing officer concerning the claimant's injury, we do not find that to be the case here. Thus, we affirm the hearing officer's carrier waiver determination.

EXTENT OF INJURY

The parties clearly stipulated that the claimant's compensable injury includes tarsal tunnel syndrome. The determinations to the contrary in the hearing officer's decision and order must therefore be reversed.

There was conflicting evidence as to whether or not the claimant's compensable injury extended to include an L1-2 bulging disc and L5-S1 radiculopathy. We have held that the question of the extent of an injury is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying the above standard of review, we find that the hearing officer's decision that the claimant's injury did not extend to include an L1-2 bulging disc and L5-S1 radiculopathy was sufficiently supported by the evidence in the record.

IR

The IR issue turns on the extent-of-injury issue. The designated doctor assessed 47% lower extremity impairment for ankylosis of the left ankle, 12% whole body for the calcaneal fracture, and 10% whole body for the lumbar spine. It was undisputed that the compensable injury included the left ankle ankylosis and the calcaneal fracture. The hearing officer arrived at a whole body IR of 21% by combining the two lower extremity impairments and converting them to a whole body IR. In his final IR the designated doctor had also combined the 21% IR with the 10% IR for the lumbar spine to arrive at a

final IR of 29%. The hearing officer did not include the 10% whole body IR for the lumbar spine because he found that the compensable injury did not include the claimed components of the lumbar spine. Thus, whether or not the IR was the 21% found by the hearing officer, or the 29% as argued by the claimant, hinges upon whether or not the hearing officer was correct in his determination that the claimant's injury did not extend to an L1-2 bulging disc and L5-S1 radiculopathy. Having affirmed this component of the hearing officer's extent-of-injury determination, we likewise affirm his resolution of the IR issue.

The hearing officer's decision that the claimant's compensable injury does not extend to include tarsal tunnel syndrome is reversed and a new decision is rendered that the claimant's compensable injury does include tarsal tunnel syndrome. The remainder of the decision of the hearing officer is affirmed.

The true corporate name of the insurance carrier is **ST. PAUL MERCURY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
701 BRAZOS, SUITE 1050
AUSTIN, TEXAS 78701.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Edward Vilano
Appeals Judge